

Cartels in the utilities sector

Cartels in the utilities sector: An overview of EU and national case law

Anticompetitive practices, Bid rigging, Cartel, Foreword, Judicial review, Joint-venture, Prices increase, Sanctions/Fines/Penalties, Exchange of information, Utilities

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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It is with great pride and pleasure that I undertook to contribute the Foreword to this special edition by e-Competitions on the topic «Cartels in the utilities sector» [1]. Over the years, the journal has developed its reputation as a major resource tool not only for the EU competition scholar but also for its separate stream of comparative law fans. This edition, I believe, continues that tradition.

The timing of this edition is especially opportune, given the announcement on 6 December 2011 [2] by the Netherlands' NMa that it had conducted dawn raids on the premises of the various Dutch mobile operators in order to determine whether they have engaged in anti competitive agreements on prices and market sharing. These dawn raids are, in turn, the natural by product of the ruling of the European Court of Justice in *T-Mobile Netherlands BV v. NMa* on 4 June 2009 [3] to the effect that the presumption of cartel like behaviour could be established in the mobile communications sector on the basis of the evidence of a single meeting between competitors. Clearly, the message of the European Court of Justice from that case is that, in the very particular circumstances of certain network industries characterised by high levels of transparency and interconnectivity, the usual amount of evidence required to establish a cartel could be short-circuited.

While the prevailing competitive concern with deregulated network industries has long been the exercise of unilateral market power by the former monopoly utility provider, twenty years of liberalisation in the EU have culminated in a series of different market dynamics and structures which are increasingly conducive to cartel oriented behaviour. This appears to be due largely to the impact of a number of ongoing economic trends, which are discussed below.

1. Tacit collusion

Many regulated sectors exhibit the characteristics of mature (or 'complex') oligopolies, which provide them with economic incentives to engage in collusive behaviour which has the effect of raising entry barriers or to maximise their profits behind existing high entry barriers. This can occur, for example, where a limited number of operators each seek to

exploit their respective network effects and/or where they exploit the ownership or operation of their respective bottleneck facilities and resources (often resulting in bilateral monopolies) [4].

These economic tendencies are often exacerbated in practice because the commercial environment has become more transparent due to the actions of sector specific regulators, who often unwittingly create the conditions for tacit collusion by mandating various consumer protection measures. By doing so, they remove the usual level of economic uncertainty from their commercial relationships. Examples of such behaviour are becoming particularly widespread in the mobile communications sector at Member State level.

The major fault lines of analysis by competition regulators lie in the fact that, whereas commercial parallelism among competitors might be commonplace in many national mobile communications markets around the world, antitrust doctrine is struggling to attach antitrust responsibility to individual operators for the apparent market failures which beset the sector, whether it be through the use of collective dominance theory or through the application of the rules against express and tacit collusion.

Given the perception that electronic communications markets (especially in the context of mobile communications) are relatively dynamic and innovative, it has been a struggle for competition regulators to conclude that tacit collusion is sustainable over time in such markets, especially given that the economic conditions usually associated as underpinning cartel behaviour (e.g., product homogeneity, stable levels of demand, static growth, common costs) do not appear to be prevalent in the electronic communications sector. However, as the sector has matured, real-life examples are emerging in both the wireline and wireless dimensions of the sector which suggest that that the sector is not altogether immune to many of the anti-competitive ills found in more traditional industrial sectors. [5]

Similarly, in the context of a widespread review of its transparency policy in the energy sector, the European Commission has been relatively open recently about the challenges it is facing in seeking to improve transparency and the symmetry of information flows while at the same time avoiding the risk of collusion among energy providers [6].

2. Spreading risks/sharing costs

One of the key elements necessary for a competition regulator to establish a case of tacit collusion is the determination of whether common cost structures exist among the major market players in a concentrated network sector. This is because it is generally understood that sustaining an anti-competitive agreement between competitors is easier to achieve where the marginal cost curves are relatively inelastic or where their fixed costs are low relative to their total costs [7].

Because the initial thrust of EU liberalisation policy across all network sectors has been to encourage, wherever possible, network based competition, rather than competition based merely upon service provision, the likelihood of identifying common cost bases among competitors was an unlikely result in many newly liberalised sectors. However, the growth of common costing models such as LRAIC (Long Run Average Incremental Costs), coupled *inter alia* with common rules for access and interconnection and the common sourcing of standardized equipment from a limited pool of international equipment providers, has meant that the cost bases of operators are becoming progressively more converged. Moreover, the pressures on mobile and fixed operators respectively to minimize costs have increased as mobile operators have sought to share the cost burdens for high spectrum prices incurred in 3G and 4G auctions, on the one hand, and the roll out of fibre optic networks, on the other [8].

A recent example of such cost sharing can be seen in the growing number of initiatives among competitive operators to co-fund alternative electronic communications delivery platforms especially as regards the deployment of Next Generation Access (NGA) networks [9]. Similarly, a recently concluded 50:50 procurement JV (for the acquisition of customer and

network equipment, service platforms and IT infrastructure) entered into between fixed national incumbent operators *France Telecom* and *Deutsche Telekom* has received clearance from the German Competition Authority [10].

When one also takes into account the fact that environmental concerns are severely limiting the roll out of new networks and governments are sponsoring fibre to the home projects, it comes as little surprise that the sharing of infrastructure among competing operators has recently been the subject of intense antitrust scrutiny by the European Commission. In *T Mobile/O2* [11], for example, the Commission was keen to ensure that the sharing of necessary information as regards infrastructure costs incurred by mobile operators would not spill over into other areas of their otherwise competitive relationship. Consequently, the nature of the information shared between cooperating infrastructure operators, the level of the network hierarchy at which such network sharing would occur, and so forth, have all been issues which were the subject of critical antitrust review.

As the current recession continues and as investment budgets accordingly become tightened, the commercial pressures on operators sharing their commonly incurred costs rise. As a *quid pro quo* for allowing such relationships to flourish, however, competition law regulators are on heightened levels of alert to ensure that the habit of necessary cooperation does not lend itself to collusive tendencies in other areas where the competitive dynamic should still prevail.

Competition concerns have already arisen in a number of different contexts, including: those expressed by the Commission in relation to the maintenance of exemptions from the competition rules to re-insurance pools and to co-insurance agreements signed on the subscriptions market, at least where they are considered to be too powerful on the relevant market [12]; the effects of joint ventures designed to develop mobile payments systems (for example, in the Netherlands and the UK), especially where there exists a danger that certain stakeholders may be excluded from such mobile payments platforms [13]; the anti-competitive effect of the system of providing “green certificates” on Belgian electricity markets, which involves the concerns of the Belgian Competition Authority “ *concerning the invoice of the costs related to the legal obligation for electricity supplier to provide energy regulators with a quota of green certificates*” [14]; and, most recently, the anti-competitive implications (*i.e.*, the potential for collusion) stemming from a series of meetings held by the “Big Five” telecommunications operators in the EU [15] and the mobile industry’s trade association (the GSMA) on various strategic issues and matters of technical cooperation for mobile applications, especially given the onset of new competitors from the Internet space which require access to the networks of the Big Five.

The rational and proportionate sharing of costs among competitors and the development of standards that facilitate trading (thereby also lowering costs) are arguably laudable pro-competitive goals. However, the recent investigations listed above suggest that the objective bases for cost sharing and the creation of common standards will be examined very carefully both for any potential for collusion and for risks of exclusion for smaller competitors. In addition, the most recent enquiries directed of Europe’s largest five telecommunications operators suggests that the fundamental questions might be asked about the scope of a Noerr-Pennington style of defence in the European Union [16].

3. Bidding markets analysis

Most competition regulators are comfortable in the understanding that the «perfect competition» model of Adam Smith has little role to play in the structure of markets in most utilities sectors, which are usually highly concentrated. In these circumstances, competition regulators are likely to be comfortable with the existence of a concentrated number of suppliers, at least if they operate in conditions which reflect the operation of an effective «bidding market» [17].

Having said that, there is still much disagreement among competition regulators as regards the question of which essential analytical elements should be used to support an effective “bidding market” scenario. For example, there is still no

universal understanding of the ideal number of competitors that should provide credible competitive alternatives in a market characterised by competitive bidding [18]. In addition, market shares can be a misleading benchmark of competitiveness in a bidding markets environment [19]. Finally, it is notoriously difficult for regulators to agree fully on whether firms are truly «close» to one another to influence their behaviour for bidding purposes [20].

Given these uncertainties, it is no surprise that the Commission has subjected a number of international telecommunications mergers (e.g., *MCI/Sprint* [21]) and a range of IT sector mergers to a rigorous bidding markets analysis. Those enquiries have been driven not only by concerns about potential unilateral anti competitive effects flowing from the notified merger, but also from concerns that the bidding market might have a tendency towards producing collusive outcomes [22].

In one recent case where a high profile merger turned on the Commission's analysis of bidding markets, the Commission inability to collect bidding data during its merger review led to on-site inspections being conducted by the Commission in May 2011, in an attempt to unearth such data [23].

4. Bid rigging concerns

Where State institutions are major purchasers in utility sectors and are driving down prices in the context of competitive tenders in oligopolistic (bidding) markets, the temptation for bid-rigging practices among the bidders increases significantly [24].

The pressures on government bodies to drive down their costs have increased recently during the current recession, thereby apparently further fuelling the economic incentives for bid rigging to occur. Not surprisingly, the bulk of the developments in this area of legal practice are derived from national precedents, with the Commission not as yet having had the opportunity to lay down any clear working rules in this area of the law.

The cases considered in this edition in the context of bid rigging prosecutions involve a range of areas, spanning waste management to construction, water and medical equipment, with the cases turning largely on actual evidence produced by national competition regulators [25].

In 2009, for example, the UK's Office of Fair Trading concluded its most widespread competition investigation of all time by finding 103 undertakings implicated in an infringement of competition rules through their participation in construction sector tenders in which they made "fake" offers for business which they had no intention of winning. Some challenges by defendants over the size of the fines imposed are still being heard before the English courts [26].

5. Insulating national markets from competition

In those situations where the international transport element of a service is open to competition but other upstream aspects of the sector remain subject to monopoly control, the tendency might develop among those operators which operate the monopolised element of the service on their home market to also enjoy the «quiet life» in the competitive service segment [27].

At one extreme, this can be accomplished through the adoption of obvious non compete covenants between "national champions" promising not to enter one another's national territories, or through the agreed mutual use of long term exclusivity relationships or 'destination' clauses which maintain the *status quo* on national markets [28]. The energy sector has been that which has been most characterised by investigations into such practices, especially at the EU level [29], but also at the national level.

At the other extreme, a range of issues involving joint sales relationships by horizontal competitors has also arisen in the sector [30]. In this latter scenario, the challenge for the Commission has been to determine whether what might otherwise legitimately be considered to be a pro competitive joint venture is a veiled form of cartel. In the energy sector, where one is dealing with the capture, storage and release of vast amounts of power, one can envisage very fertile ground for a range of cooperative relationships for the better management of such complex relationships spanning the full scope of the energy value chain. The tendency for such enduring cooperative relationships to deteriorate into more classic forms of cartel like behaviour poses clear antitrust risks which the Commission is keen to address [31].

In early 2012, for example, the Commission conducted surprise inspections in the electricity sector at the offices of the respective electricity trading platforms of *EPEX Spot* (covering the territories of France, Germany, Austria and Switzerland) and *Nord Pool Spot* (covering electricity markets in Scandinavia). These inspections were conducted in furtherance of concerns that the parties were engaged in “geographic market sharing” through their operation of a proposed JV in the power exchange market, whose alleged aim was to restrict the possibilities of cross-border electricity trade [32].

6. Traditional cartel behaviour

In some utilities sectors tending towards the commoditisation or standardisation of certain products or services, a sharp increase in the price of wholesale inputs has led to the passing on of those costs directly to downstream retail customers, much in common with more traditional industrial sectors of the economy. These pass-through strategies have been alleged to have been the result of an explicit or tacit understanding among key industry members [33].

Most recently, the Commission opened proceedings against a number of companies active in the French water sector for their possible price coordination behaviour on various French water and waste water markets. In particular, this coordination was alleged to have been effected through pricing elements for water services that had been “*invoiced to final customers*” [34].

In the recent air freight cargo (alleged agreements *inter alia* regarding fuel surcharges) [35] and passenger services [36] investigations that have taken place, the particular nature of the aviation sector involved has thus far not appeared to pose any particular sector-specific problems beyond those traditionally associated with the application of cartel rules across all other industrial sectors.

By contrast, the banking sector has seen a number of recent investigations focus upon the reactions of banks to fundamental shifts in regulatory obligations or the introduction of new technology, both of which might tend to change cost structures and/or have an effect on profit margins [37].

7. Information sharing

Unlike many other industries, the sharing of what is tantamount to sensitive competitive information among many market players in utility sectors has often not been perceived as being problematic. This is partially due to the fact that sophisticated connectivity relationships require the exchange of technical standards information, traffic timing/volume data and network configuration details is often not only considered to be desirable in practice but is also often regulated in many material respects.

Similarly, industries such as maritime transport and aviation, because they need to deal with capacity management issues and with seasonal traffic flow fluctuations, are often seen to require otherwise questionable levels of information exchange between competitors in order to facilitate such legitimate aspects of competitive interaction.

The recent regularisation of information exchange principles in the maritime sector under EU competition rules [38] now means, however, that market players in utility industries will need to tread just as warily as market players in other (non-network) industries when it comes to addressing antitrust concerns derived from information exchanges among competitors. Most recently, this has been reflected in the tensions encountered by the Commission in its efforts to inject greater transparency into commercial dealings in the energy sector, given their potential to facilitate collusive behaviour in concentrated markets [39].

This again reflects a growing recognition that utility sectors, while they are clearly «different» from many other industrial sectors, are not so different as to justify the application of radically different legal norms under the cartel regime found in EU competition rules.

In sum, this edition covers a range of subject-matter whose relative importance in the field of cartel-related competition enforcement is more than likely to increase over time. Much of that is prompted by underlying economic conditions which drive collusive tendencies, and by the fact that the liberalisation process in Europe in regulated network (often «utility») sectors has now matured to the point where there are as many things in common with other industries as there are not.

[1] Many thanks to Slawomir Bryska of the Brussels office of Gibson Dunn for his invaluable research skills in assisting the author to bring his thoughts together for this Foreword. Any errors of judgement remain those of the author, and in no way reflect the views of any of the Firm

[2] Available at <http://www.nma.nl/en/documents> and ... (as of 22 March 2012).

[3] ECJ, June 4th, 2009, *T-Mobile Netherlands e.a.*, Case C-8/08, [2009] 5 CMLR 1701, ECJ. See [Josivas](#), *The European Court of Justice clarifies the notion of concerted practice and holds that a single meeting amongst competitors where they exchanged sensitive information can be caught by EU Antitrust rules (T-Mobile Netherlands)*, 4 June 2009, e-Competitions, n 35319 .

[4] For the introduction to the economics of collusion see, *inter alia*, S. Bishop and M. Walker *Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 1999), pp. 79-86.

[5] For example, refer to the proceedings against the French mobile sector cartel dating back to the 1 December 2006 fines imposed by the French Competition Authority (on the operators *SFR, Bouygues and Orange*), and to the more recent investigations into the conduct of *Telecom Italia Mobile* and *Vodafone* regarding their simultaneous price increases in Italy, as reported by an Italian consumer organization - *Altroconsumo*: <http://www.altroconsumo.it>. See [Laura Castex](#), *The French Competition Council imposes record fines on the mobile telephone operators for market sharing and exchange of information (Orange, SFR, Bouygues)*, 3 November 2005, e-Competitions, n 347 ; [Jerome Philippe, Caroline Evrard](#), *The Paris Court of Appeal confirms the NCA information and maintaining market shares (Bouygues Telecoms, SFR, Orange France)*, 12 December 2006, e-Competitions, n 12702 ; [Michel Debroux](#), *The Paris Court of appeal upholds France confirms a strict -yet not entirely clear- approach towards exchange of information between competitors in oligopoly markets (Bouygues Telecom, SFR, Orange France)*, 12 December 2006, e-Competitions, n 12728 and [Mickael Rivollier](#), *The French Commercial Supreme Court rules that exchange of information is not prohibited per se and recalls that imposing fine in an oligopolistic market requires to demonstrate a concrete anticompetitive object or effect (Bouygues Telecom, Orange, SFR, «Mobile telephony case«)*, 29 June 2007, e-Competitions, n 13983 .

[6] Refer to Commission Press Release, MEMO/11/641 (27 September 2011).

[7] See footnote 4 above, pp. 84-85.

[8] For example, as regards the development of a jointly funded NGA network in Italy, refer to Italy Experiments with a Joint Investment Model *Utilities Law Review*, Volume 18 Issue 1, 2010. In addition, cable TV operators in Belgium have pooled resources to purchase spectrum in order to establish a commonly held mobile aim to their existing fixed questions (see <http://www.capacitymagazine.com/Art...>).

[9] Refer to European Commission NGA Working Group 3: Synthesis of Outputs (13 July 2011), p. 4, available at http://ec.europa.eu/information_soc...

[10] The <http://www.bundeskartellamt.de/wDeu...>

[11] European Commission, 30 April 2003, *Case COMP/38.370, O2 UK Limited/T-Mobile UK Limited («UK Network Sharing Agreement)*. See [David Gabathuler, Wolf Sauter, *The European Commission provides clear guidance on the compliance of network sharing in 3rd generation mobile telecommunications systems with EC competition rules \(T-Mobile/O2\)*, 30 April 2003, e-Competitions, n 38440](#) .

[12] Reinsurers have traditionally been allowed to group together to share exposure to certain types of risk, such as those arising from nuclear, terrorist or environmental disaster, based in the understanding that undertakings might be reluctant to assume the risk alone.

[13] In the Netherlands JV, for example (see <http://www.nfctimes.com/news/dutch-...>), the Dutch banks and telecommunications operators involved represented 90% and between 80-90% of their respective markets affected by the platform. In the UK, (see, *inter alia*, <http://www.nfcworld.com/2011/09/08/...>), only one mobile operator was excluded from the JV.

[14] Refer to Press Release of the Belgian Competition Authority (*Conseil de la Concurrence*) of 6 October 2011, see <http://www.vreg.be/rapp-2011-7>). The actions taken by the local competition authority are prompted by a report of the sector-specific regulator in the Flemish region of the country (VREG), which had concluded that *some supplies invoice to the final customers of the Flemish region the fine due in the case of breach of the obligation to provide the regulator with green certificates* [

[15] Namely, *France Telecom, Deutsche Telekom, Telefónica* , *Vodafone* and *Telecom Italia*.

[16] A doctrine developed in the United States which exempts from antitrust scrutiny genuine members of industry. Even the U.S. doctrine, however, turns on the *restrain at issue* ; see *Allied Tube & Conduit Corp v Indian Head Inc.*, 486 U.S. 492, 499, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988).

[17] See S. Bishop and M. Walker, (2nd edition, London Sweet & Maxwell 2002), pp. 434-443.

[18] See, for example, the bidding contest organized under the 1990 Broadcasting Act carried out by the ITC (16 October 1991).

[19] See, for example, European Commission, 30 July 1997, *Case IV/M877, Boeing/McDonnell Douglas*, O.J. L336/16. See [Alexander Schaub, *The European Commission authorizes the merger between two US civil and military aerospace companies raising the issue of international cooperation in antitrust matters \(Boeing/MDD\)*, 30 July 1997, e-Competitions, n 39486](#) and [Conrado Tromp, *The European Commission approves, subject to remedies, a merger between two US civil and military aerospace companies \(Boeing/McDonnell Douglas\)*, 30 July 1997, e-Competitions, n](#)

39496.

[20] See footnote 17 above, pp. 437-439.

[21] European Commission, 28 June 2000, Case COMP/M.1741, MCI WorldCom/Sprint (merger procedure under Regulation No 4064/89). See Geraldine Emberger, John Kemp, *The European Commission clears, subject to conditions, a merger between two US leading telecommunications companies (Worldcom/MCI)*, 8 July 1998, e-Competitions, n 39376 and Walter Tretton, Neil Marshall, Anna Papaioannou, *The European Commission prohibits the merger between two US telecommunications companies (MCI WorldCom/Sprint)*, 28 June 2000, e-Competitions, n 39139 .

[22] A recent investigation in Finland in the forestry sector provides some indication of how a bidding procedure might be manipulated. The Finnish paper companies Stora Enso, UPM Metsä and UPM-Kymmene were fined 51 million Euros in 2009 by the Finnish Competition Authority because of their sharing of information on the status of contract negotiations with individual forestry customers. As of early 2012, over 600 claimants were pursuing claims for damages before the Finnish courts. Refer to <http://www.kilpailuvirasto.fi/cgi-b...> for the original ruling finding collusive behaviour.

[23] Refer to Commission Press Release, MEMO/11/355 (25 May 2011).

[24] See, for example, S. Mobley and G. Murray, Law 1 (Division II); Chapter 4 - Collusive Tendering (Issue 88), pp. II-91-95.

[25] One of the most extreme examples of such practices is illustrated in the cartel proceedings brought against members of the construction industry in Hungary over the period 2004-2008 (including, inter alia, Betonut, DEBMUT, EGUT, Hidepito, Strabag). By way of contrast, some markets characterized by bidding practices might also be prone to behaviour resembling a collective boycotts (e.g., in early 2012 the Romanian Competition Authority imposed large fines on those oil companies found to have infringed competition rules by their withdrawal of a particular petroleum product (known as Premium
<http://www.consiliulconcurrentei.ro/...>

[26] See, for example, Judgment of 25 January 2012 of the Court of Appeal in the case Interclass Holdings Limited & Interclass PLC v Office of Fair Trading (C3/2011/1965). See Maria Kamnaki, *The UK Office of Fair Trading, following its biggest investigation to date, names and shames 112 construction companies in a statement of objections formally accusing them of participation in widespread bid rigging (Construction Industry Cartels)*, 17 April 2008, e-Competitions, n 19969.

[27] See, for example, the proceedings brought against the Keolis, Connex and Transdev market sharing cartel before the French Competition Authority (*Autorité de la Concurrence*), 5 July 2005, Decision n 05-D-38, *relative à des pratiques mises en oeuvre sur le marché du transport public urbain de voyageurs*. See Jean-Patrice de La Laurencie, Malý Courtaigne-Op, *The French Competition Authority fines three major national companies for implementing a cartel in the public passenger urban transport market, with potential appreciable effect on trade between member States (Keolis, Connex and Transdev)*, 7 July 2005, e-Competitions, n 251 and Noelle Lenoir, Dan Roskis, *The Paris Court of Appeal upholds the NCA decision fining a cartel in the public passenger urban transport market with reference to the EC Commission*, 7 February 2006, e-Competitions, n 471 .

[28] In this respect, the investigations of Gazprom and its natural gas distribution partners in relation to restricting gas resale through the use of destination clauses and long-term gas supply contracts has been at the forefront of the energy enforcement agenda (refer to footnote 6). The Commission has also recently announced its investigation into the long-term contracts that exist on the Bulgarian electricity market. Refer to AES Corp. testimony (27 February 2012, 10-K

for AES Corp.). See [Harold Nyssens, Dominik Schnichels, Concetta Cultrera, *The European Commission announces the closure of their investigation into the supply relationship between Russian gas producer and Italian wholesaler \(Gazprom / ENI\)*](#), 6 October 2003, e-Competitions, n 38402 .

[29] Recently, by way of example, the E.ON/GDF market sharing cartel was the focus of much attention in the energy sector (Commission Press Release [IP/09/1099](#), 8 July 2009). See also H. Vedder, [An Overview of Developments in 2009 and 2010](#) [Alexander Gee, Jasmin Battista, Ulrich Von Koppenfels, *The European Commission imposes heavy fine on two European gas companies for operating a market-sharing agreement \(E.ON, E.ON Ruhrgas, GDF Suez\)*](#), 8 July 2009, e-Competitions, n 35024 and [Ricardo Cardoso de Andrade, Oliver Koch, Sandra Kijewski, Patrick Lindberg, Karoly Nagy, *The European Commission renders legally binding commitments offered by French and German incumbent gas operators concerning long-term capacity bookings \(GDF, E.ON\)*](#), 3 December 2009, e-Competitions, n 34851 .

[30] The Commission has addressed joint selling arrangements in the gas sector in a number of cases: see, for example, Corrib ([IP/01/578](#), 20 April 2001), GFU ([IP/02/1084](#), 17 July 2002) and DONG/DUC ([IP/03/566](#), 24 April 2003). See [Dominik Schnichels, Fabien Valli, *The European Commission closes an investigation involving the incumbent Danish gas supplier and the country individually \(DONG/DUC\)*](#), 23 April 2003, e-Competitions, n 38907 .

[31] See (relevant at the time of the proceedings in question) Commission Notice on the applicability of Article 81 EC of the Treaty [now Article 102 TFEU] to horizontal co-operation agreements, OJ [2001] C3/02 at para 151. In its Horizontal Guidelines, the Commission states that integration of other marketing functions, and its integration will generate substantial efficiencies.

[32] Refer to Commission Press Release, [MEMO/12/78](#) (7 February 2012); see also Joaquin Almunia [SPEECH/12/172](#) (8 March 2012).

[33] As early as in European Commission, 2 January 1973, [Decision 73/109/EEC](#), European Sugar Cartel, OJ [1973] L 140/17 at 42, [1973] CMLR D65 at 110.

[34] Investigation involving SAUR, Suez Environnement/Lyonnaise des Eaux and Veolia, along with the trade association Fédération Professionnelle des Entreprises de l'Énergie [IP/12/26](#) (18 January 2012).

[35] See Commission Press Release, [IP/10/1487](#) (9 November 2010).

[36] □ See Press Release, [MEMO/08/158->](#) (11 March 2008), now administratively closed.

[37] For example, the UK banks RBS and Barclays appears to have been prompted by the response of those banks to the introduction of new capital rules established under Basel II (Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework - Comprehensive Version, June 2006, Basel Committee on Banking Supervision). The raising of the new capital requirements on banks meant that bank profits were being squeezed, thereby incentivizing the banks to raise their pricing on unsecured loans, see OFT, 20 January 2011, Decision No. CA98/01/2011, Case CE/8950/08. See [Article from European Competition Network Brief, *The UK OFT adopts decision in loan pricing case \(Royal Bank of Scotland, Barclays\)*](#), 20 January 2011, e-Competitions, n 35737 . In France, the French Competition Authority pursued several local banks with respect to the collectively agreed cheque-clearing fees imposed by them (fining them a total of 384 million Euros). In the view of the French Competition Authority, the evidence presented by the banks to

justify an objective need to charge the fee was weak, especially in light of the fact that the recent digitisation of the clearing system should have resulted in a lowering of costs (rather than an increase in profitability through the raising of prices to consumers). Refer to: French Competition Authority (*Autorité de la Concurrence*), 20 September 2010, [Decision n 10-D-28, relative aux tarifs et aux conditions liées appliquées par les banques et les établissements financiers pour le traitement des chèques remis aux fins d](#) . Overturned by the Paris Court of Appeal, see: *Court d* , 23 February 2012, [Case n 2010/20555](#) . See [Helene Lallemand, The French competition authority fines 11 French banks new digital system for processing checks \(Cartel in the banking sector\)](#), 20 September 2010, e-Competitions, n 33278 .

[38] The subject of information exchanges is covered by paragraphs by paragraphs 38 to 56 of the [Guidelines on the application of Article 53 of the EEA Agreement to maritime transport services \(OJ C 35, 9.2.2012, p. 26](#)) .

[39] Refer to discussion at footnote 6.

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